

JUDGMENT OF THE COURT (Second Chamber)

17 July 2008*

In Case C-488/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 24 November 2006,

L & D SA, established in Huércal de Almería (Spain), represented by S. Miralles Miravet, abogado,

appellant,

the other parties to the proceedings being:

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by J. García Murillo, acting as Agent,

defendant at first instance,

* Language of the case: Spanish.

Julius Sämann Ltd, established in Zug (Switzerland), represented by E. Armijo Chávarri, abogado,

intervener at first instance,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, K. Schiemann, J. Makarczyk, J.-C. Bonichot and C. Toader (Rapporteur), Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2008,

gives the following

Judgment

- 1 By its appeal, L & D SA ('L & D') seeks to have set aside the judgment of the Court of First Instance of the European Communities of 7 September 2006 in Case T-168/04 *L & D v OHIM — Sämann (Aire Limpio)* [2006] ECR II-2699 ('the judgment under appeal'), by which the Court of First Instance dismissed its action brought against the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 15 March 2004 (Case R 326/2003-2, 'the contested decision'). By that decision, the Board of Appeal allowed, in part, the appeal of the company Julius Sämann Ltd ('Sämann') and refused, in part, L & D's application for registration of a figurative sign including the word element 'Aire Limpio'.

I — Legal context

- 2 Under Article 7(1)(b) and (e)(ii) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), registration is to be refused for 'trade marks which are devoid of any distinctive character' and signs which consist exclusively of 'the shape of goods which is necessary to obtain a technical result', respectively.

3 Article 8 of Regulation No 40/94 provides:

‘1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

...

(b) if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.

2. For the purposes of paragraph 1, “Earlier trade marks” means:

(a) trade marks of the following kinds with a date of application for registration which is earlier than the date of application for registration of the Community trade mark... :

(i) Community trade marks;

(ii) trade marks registered in a Member State...;

(iii) trade marks registered under international arrangements which have effect in a Member State;

...'

4 Article 73 of Regulation No 40/94 provides:

'Decisions of the Office shall state the reasons on which they are based. They shall be based only on reasons or evidence on which the parties concerned have had on opportunity to present their comments.'

II — Background to the dispute

5 On 30 April 1996, L & D filed an application with OHIM to register as a Community trade mark the figurative mark containing the word element 'Aire Limpio' ('the Aire Limpio mark'), reproduced below:



6 The goods and services in respect of which registration was sought are in Classes 3, 5 and 35 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:

— Class 3: ‘Perfumery, essential oils’;

— Class 5: ‘Scented air fresheners products’;

— Class 35: ‘Advertising; commercial business handling; commercial administration; office works’.

7 On 29 September 1998, Sämman filed a notice of opposition under Article 42 of Regulation No 40/94 to the registration applied for, on the basis of a number of earlier trade marks. The grounds relied on in support of its opposition were those referred to in Article 8(1)(b) and (5) of Regulation No 40/94.

8 Those earlier marks included Community figurative mark No 91 991, reproduced below, lodged on 1 April 1996 and registered on 1 December 1998 for goods in Class 5 (‘mark No 91 991’):



9 They also included 17 other national and international figurative marks, all with a similar outline, though all but one different in having a white base and/or some wording on the body of the tree.

10 The two international figurative marks Nos 178 969 and 328 915 are particularly relevant for the purposes of this appeal. The first includes the word element 'CAR-FRESHNER' (the 'CAR-FRESHNER mark') and the second, 'ARBRE MAGIQUE' (the 'ARBRE MAGIQUE mark'). Those two marks, registered on 21 August 1954 and 30 November 1966 respectively for goods in Classes 3 and 5 and protected, in particular, in Italy, look like this:



- 11 By decision of 25 February 2003, OHIM's Opposition Division rejected the opposition in its entirety.
- 12 In its analysis of Article 8(1)(b) of Regulation No 40/94, the Opposition Division compared the Aire Limpio mark and mark No 91 991.
- 13 In this connection, it considered, essentially, that the shape of a fir tree, as the element shared by the two marks, was descriptive with regard to deodorising or air freshener goods and, therefore, was not very distinctive. The significant graphic and verbal differences between the two marks thus outweighed the weakly distinctive similarities, creating an overall impression that was sufficiently different to rule out any likelihood of confusion or association.
- 14 Having reached that conclusion, the Opposition Division considered that it was not necessary to examine the other earlier marks relied on by Sämman, since those marks displayed even greater differences in relation to the Aire Limpio mark than did mark No 91 991.
- 15 By the contested decision of 15 March 2004, the Second Board of Appeal of OHIM allowed in part the appeal brought by Sämman against the Opposition Division's decision.
- 16 In accepting the ground of appeal alleging infringement of Article 8(1)(b) of Regulation No 40/94, the Board of Appeal allowed the opposition in part and refused to

register the Aire Limpio mark for goods in Classes 3 and 5. As regards, by contrast, the services in Class 35, it confirmed the Opposition Division's decision and rejected the opposition.

17 To assess whether there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94, the Board of Appeal for the 'same reasons of economy' as those given by the Opposition Division, focussed its comparison on the Aire Limpio mark and on mark No 91 991 'as a mark representative' of the other earlier marks relied on. In its assessment, however, it reached the opposite conclusion to that of the Opposition Division.

18 Thus, it held that the prolonged use and well-known nature in Italy of the 'earlier mark' gave it a particularly distinctive character and that there was, having regard to that distinctiveness and the conceptual similarity between the two marks, a likelihood of confusion, at least on the part of the Italian public.

19 To reach that conclusion, it relied, first, on data relating to Sämänn's advertising and sales of car air fresheners and, secondly, on the fact that the CAR-FRESHNER mark had been protected since 1954.

III — Procedure before the Court of First Instance and the judgment under appeal

20 By application lodged at the Registry of the Court of First Instance on 14 May 2004, L & D brought an action against the contested decision. It raised two pleas to that end, alleging infringement of Articles 8(1)(b) and 73 of Regulation No 40/94 respectively. By the judgment under appeal, the Court of First Instance dismissed that action.

- 21 As regards the first plea, the Court first observed, in paragraph 70 of the judgment under appeal, that the finding of the Board of Appeal to the effect that mark No 91 991 had a particularly distinctive character in Italy was based on the acceptance of the prolonged use and well-known nature of the ARBRE MAGIQUE mark.
- 22 In paragraphs 72 to 77 of the judgment under appeal, it then examined whether that finding, according to which the distinctive character of mark No 91 991 is inferred from the use of another mark, was legitimate.
- 23 Referring to paragraphs 30 and 32 of the judgment in Case C-353/03 *Nestlé* [2005] ECR I-6135, the Court held that the answer to that question was yes if mark No 91 991 could be regarded as part of the ARBRE MAGIQUE mark.
- 24 It considered in that regard that the Board of Appeal was right to hold that the representation of the silhouette of the fir tree, which plays a significant or even predominant role in the ARBRE MAGIQUE mark, corresponds to the sign of mark No 91 991. As a result, it held that the Board of Appeal had been fully entitled to hold that mark No 91 991 constituted part of the ARBRE MAGIQUE mark. Accordingly, the first mark could have acquired a distinctive character following its use as part of the second mark.
- 25 The Court concluded that the Board of Appeal had rightly examined all the evidence relating to the use and well-known nature of the ARBRE MAGIQUE mark in order to establish the prolonged use, the well-known nature and, therefore, the particularly distinctive character of mark No 91 991.

- 26 As regards the actual examination of the evidence, the Court of First Instance held, in paragraph 78 of the judgment under appeal, that the contested decision had rightly stated that it was apparent from the evidence in the case-file that mark No 91 991, as part of the ARBRE MAGIQUE mark, had been the subject of prolonged use in Italy, was well known there and therefore had a particularly distinctive character.
- 27 In that regard, in paragraphs 80 to 84 of the judgment under appeal, it rejected the argument seeking to call into question the evidential force of that evidence on the ground that it referred to a period after the appellant's filing of the application for registration of the trade mark. It held that the Board of Appeal was able legitimately to hold that the subsequent circumstances enabled conclusions to be drawn on the situation as it was on the date of L & D's filing of the application for registration.
- 28 In paragraph 85 of the judgment under appeal, the Court also rejected the appellant's argument to the effect that the Board of Appeal was wrong to find that the earlier mark had a particularly distinctive character in Italy by relying solely on general indications regarding the volume of advertising and sales figures. It held, in this connection, first, that the case-law relied on by L & D did not concern the assessment of whether a registered mark which has already acquired distinctive character is well known and, secondly, that the Board of Appeal took into account not only general indications, but also the prolonged use of the ARBRE MAGIQUE mark.
- 29 Finally, the Court, in paragraph 86 of the judgment under appeal, rejected L & D's argument to the effect that the Board of Appeal was wrong to rely on the fact that the earlier mark had had protection in an essentially identical form since 1954, thereby placing the date of the application for registration of the mark on the same footing as the date of actual use of the CAR-FRESHNER mark. The Court found in that regard that, even though the contested decision states that the CAR-FRESHNER mark has been registered since 1954, the Board of Appeal, as regards prolonged use, relied on the established use in Italy of the ARBRE MAGIQUE mark.

30 The Court then held, in paragraphs 89 to 96 of the judgment under appeal, that the goods designated by the ARBRE MAGIQUE mark and by the Aire Limpio mark, as well as those marks themselves, are similar.

31 So far as the similarity of the marks is concerned, it pointed out that, visually, the graphic element in the Aire Limpio mark has a clearly dominant character in the overall impression given by the sign and noticeably prevails over the word element.

32 Contrary to L & D's assertions, the overall impression given by the design is not that of a comical character, but actually that of an image resembling a fir tree. The graphic representation corresponding to a fir tree therefore appears, visually, as the dominant element in the overall impression given by the mark in respect of which registration is sought. Conceptually, the signs in question are both associated with the silhouette of a fir tree. In view of the impression given and the fact that the expression 'aire limpio' has no particular meaning for the Italian public, their conceptual similarity must be confirmed.

33 As regards the likelihood of confusion, the Court, in paragraphs 100 to 102 of the judgment under appeal, considered that the average consumer, which comprises the relevant public, will have a tendency to trust mainly the image of the mark applied to those goods, namely the silhouette of a fir tree. Consequently, in view of, first, the similarity of the goods in question and the visual and conceptual similarity of the marks in question and, secondly, the fact that the earlier mark has a particularly distinctive character in Italy, the Board of Appeal did not err in finding that there was a likelihood of confusion.

34 The Court then, in paragraph 104 of the judgment under appeal, rejected the appellant's argument to the effect that the earlier mark has a weak distinctive character owing to the fact that the silhouette of the fir tree is descriptive of the goods in question, stating that the earlier mark is not the mere representation of a fir tree but is

stylised and has other particular characteristics, and that, in addition, it has acquired a particularly distinctive character. As regards the guidelines of the United Kingdom Patent Office, which the appellant claims confirm the descriptive character of the silhouette of the fir tree for the goods concerned, the Court held that they were of no relevance because of the autonomous nature of the Community trade mark regime.

35 The Court also rejected L & D's arguments intended to show that the earlier mark should not have been registered because, first, it was made up only of the shape of the product which is marketed under that mark and, secondly, the shape of the earlier mark, namely the silhouette of a fir tree, was necessary to obtain the technical result sought by the product. In this connection, the Court observed in paragraph 105 of the judgment under appeal that the appellant could not, in any event, in opposition proceedings, rely on an absolute ground for refusal precluding valid registration of a sign by a national office or by OHIM.

36 As regards the second plea, alleging infringement of Article 73 of Regulation No 40/94, that was rejected in paragraphs 113 to 118 of the judgment under appeal. The Court held that the contested decision showed in a clear and unequivocal manner the reasoning of the Board of Appeal and that it was apparent from that decision that the appellant had had an opportunity to present its comments on all the factors on which the decision was based and on the use, by the Board of Appeal, of the evidence relating to the use of the earlier marks.

IV — Procedure before the Court of Justice and the forms of order sought

37 In its appeal, L & D claims that the Court should:

— set aside the judgment under appeal in its entirety;

- annul points 1 and 3 of the operative part of the contested decision, in so far as that decision, first, annuls in part the Opposition Division’s decision and refuses to register the Aire Limpio mark for goods in Classes 3 and 5 and, secondly, orders each of the parties to bear its own costs in connection with the opposition and appeal proceedings; and

- order OHIM to pay the costs.

38 OHIM and Sämänn contend that the Court should dismiss the appeal and order the appellant to pay the costs.

V — The appeal

A — *Admissibility*

39 As a preliminary point, OHIM and Sämänn argue that the appeal is inadmissible, claiming that the pleas raised by L & D seek a review of the assessment of the facts made by the Court of First Instance. In addition, Sämänn claims, the appeal identically reproduces the grounds of the action against the contested decision.

40 First of all, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that an appeal lies on points of law only and that the appraisal of the facts thus does not constitute, save where they have been distorted, a

point subject to review by the Court (see Case C-214/05 P *Rossi v OHIM* [2006] ECR I-7057, paragraph 26, and judgment of 20 September 2007 in Case C-193/06 P *Nestlé v OHIM*, paragraph 53).

41 However, it must be stated that, in the present case, the appeal brought by L & D does not seek only to challenge findings of a factual nature made by the Court of First Instance but seeks, at least in part, a declaration of errors of law in the judgment under appeal.

42 Secondly, the plea of inadmissibility alleging that the appeal identically reproduces the grounds of the action brought before the Court of First Instance, a plea which, moreover, *Sämann* has not further clarified, must also be rejected.

43 It is evident from the Court's case-law that, provided that the appellant challenges the interpretation or application of Community law by the Court of First Instance, as L & D does in its appeal, the points of law examined at first instance may be discussed again in the course of an appeal (see, inter alia, Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 50).

44 Accordingly, the appeal must be declared admissible.

B — *Substance*

⁴⁵ In support of its appeal, L & D advances two pleas in law, alleging infringement of Articles 8(1)(b) and 73 of Regulation No 40/94 respectively.

1. The first plea, alleging infringement of Article 8(1)(b) of Regulation No 40/94

⁴⁶ The first plea is divided into three branches based on the absence, respectively, of distinctiveness of mark No 91 991, of similarities between that mark and the Aire Limpio mark and of a likelihood of confusion between those two marks.

(a) The first branch of the first plea

⁴⁷ L & D's arguments, in the context of the first branch of its first plea, essentially hinge on four complaints concerning:

— the inference of the particularly distinctive character of mark No 91 991 from data relating to the ARBRE MAGIQUE mark;

— the descriptive character of mark No 91 991;

- the existence of absolute grounds for refusal of mark No 91 991; and

- the insufficiency of the evidence to establish the particularly distinctive character of the ARBRE MAGIQUE mark.

(i) The inference of the particularly distinctive character of mark No 91 991 from data relating to the ARBRE MAGIQUE mark

⁴⁸ By its first complaint, L & D submits that the Court of First Instance was wrong to infer the particularly distinctive character of mark No 91 991 exclusively from data relating to the ARBRE MAGIQUE mark. In this connection, it casts doubt, inter alia, on whether it is actually possible to make such an inference in circumstances such as those of the present case.

⁴⁹ As the Court of First Instance recalled in paragraph 73 of the judgment under appeal, the Court of Justice has already held that the acquisition of the distinctive character of a mark may also be as a result of its use as part of another registered trade mark. It is sufficient that, in consequence of such use, the relevant class of persons actually perceives the product or service, designated by the mark, as originating from a given undertaking (see, to that effect, *Nestlé*, paragraphs 30 and 32).

⁵⁰ Although the facts in *Nestlé* differed from those in the present case, that does not necessarily mean, contrary to what L & D submits, that that finding of general application does not apply also to a factual and procedural context such as that at issue in the present case.

- 51 In particular, the fact that *Nestlé* concerned the acquisition of distinctive character by a mark which it was sought to register, whereas the present case concerns establishing whether an earlier mark has a particularly distinctive character in order to ascertain whether there is a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94, does not, as the Advocate General pointed out in point 51 of her Opinion, justify any difference of approach.
- 52 The Court of First Instance was, consequently, justified in observing in paragraph 75 of the judgment under appeal that, if mark No 91 991 could be regarded as part of the ARBRE MAGIQUE mark, it was possible to establish the particularly distinctive character of the former on the basis of evidence relating to the use and well-known nature of the latter.
- 53 In so far as L & D seeks, by this complaint, to cast doubt upon the finding, in paragraph 76 of the judgment under appeal, that mark No 91 991 constitutes part of the ARBRE MAGIQUE mark, since the representation of the silhouette of the fir tree plays a significant or even predominant role in the ARBRE MAGIQUE mark and corresponds to the sign of mark No 91 991, it must be observed that the Court made an assessment of a factual nature in this respect.
- 54 As pointed out in paragraph 40 of this judgment, an appeal lies on points of law only and the assessment of the facts does not constitute, save where they have been distorted, a point subject to review by the Court of Justice.
- 55 Furthermore, inasmuch as L & D further submits that the assessment of the Court of First Instance, according to which the silhouette of a fir tree plays a predominant role in the ARBRE MAGIQUE mark, diverges from the case-law of the Court of Justice, it need only be stated that, contrary to what the appellant asserts, that case-law does not in any way show that, in the case of mixed trade marks comprising both graphic and word elements, the word elements must systematically be regarded as dominant.

56 It follows from the foregoing that this complaint must be rejected as in part inadmissible and in part unfounded.

(ii) The descriptive character of mark No 91 991

57 By its second complaint, L & D criticises the Court of First Instance for having rejected, in paragraph 104 of the judgment under appeal, its argument to the effect that mark No 91 991 has a weak distinctive character owing to the fact that the silhouette of the fir tree is descriptive of the goods in question.

58 First, the Court of First Instance did not err in law in holding that the guidelines of the United Kingdom Patent Office which, according to the appellant, confirm the descriptive character of the silhouette of the fir tree for the goods in question, were of no relevance. As the Court of First Instance rightly observes, the Community trade mark regime is an autonomous system with its own set of rules and objectives peculiar to it and applies independently of any national system, and the legality of decisions of the Boards of Appeal must be evaluated solely on the basis of Regulation No 40/94, as it is interpreted by the Community Courts (see, to that effect, Case C-238/06 P *Develey v OHIM* [2007] ECR I-9375, paragraphs 65 and 66).

59 As regards L & D's argument criticising as contradictory to other statements in the judgment under appeal the Court's finding that mark No 91 991 is not the mere representation, faithful to reality, of a fir tree, suffice it to note that there is no contradiction between that finding and the description of that mark as being the 'silhouette of a fir tree'.

60 In so far as L & D further seeks to cast doubt on the accuracy of that finding by the Court of First Instance, it must be pointed out that it is an assessment of a factual nature not subject to review by the Court.

61 It follows from the foregoing that this complaint must be rejected as in part inadmissible and in part unfounded.

(iii) The existence of absolute grounds for refusal of mark No 91 991

62 The third complaint raised by L & D is directed against paragraph 105 of the judgment under appeal, in which the Court of First Instance rejected its arguments seeking to show that mark No 91 991 had, at the most, only a very weak distinctive character owing to the fact that, first, it was made up only of the shape of the product which is marketed under that mark and, secondly, the shape of the earlier mark, namely the silhouette of a fir tree, was necessary to obtain the technical result sought by the product.

63 L & D submits that the Court of First Instance erred in rejecting those arguments without examining them, holding that 'the [appellant] cannot, in any event, in opposition proceedings, rely on an absolute ground for refusal precluding valid registration of a sign by a national office or by OHIM'.

64 In that regard, it must be pointed out that the two arguments put forward by L & D before the Court of First Instance, which, from the evidence available in the file, do not appear moreover to have been raised before the OHIM bodies, sought not to call into question the validity of mark No 91 991, but to demonstrate the initially very weak distinctive character of that mark.

65 However, an earlier mark can have a particularly distinctive character not only *per se*, but also because of the reputation it enjoys with the public (see C-251/95 *SABEL* [1997] ECR I-6191, paragraph 24).

66 In paragraphs 78 to 88 of the judgment under appeal, the Court of First Instance established that mark No 91 991 has acquired a particularly distinctive character in Italy because of its well-known nature in that Member State, which stems in particular from its prolonged use as part of the ARBRE MAGIQUE mark and the well-known nature of that latter mark in Italy.

67 In those circumstances, even if L & D could rely on the argument that mark No 91 991 possesses merely a very weak inherent distinctive character, since it consists of the shape of the product which is sold under that mark and that shape is necessary to obtain the desired technical result, the fact remains that such an argument, even if it were well founded, could not, in any event, cast doubt on the finding made by the Court of First Instance that that mark has acquired a particularly distinctive character in Italy because it is well known in that Member State.

68 It follows from the foregoing that this complaint is ineffective and must be rejected.

(iv) The insufficiency of the evidence to establish the particularly distinctive character of the ARBRE MAGIQUE mark

69 By its fourth complaint, L & D criticises the Court of First Instance for having accepted that the Board of Appeal was entitled to find that the ARBRE MAGIQUE mark had a particularly distinctive character, as did therefore mark No 91 991, on the basis of the evidence in the contested decision.

70 First, the Court of First Instance did not err in law in holding that the Board of Appeal was able to rely on data concerning a period subsequent to the application for registration of the Aire Limpio mark.

71 In fact, as the Court of First Instance correctly recalled in paragraph 81 of the judgment under appeal, the case-law of the Court of Justice shows that account may be taken of evidence which, although subsequent to the date of filing the application, enables the drawing of conclusions on the situation as it was on that date (see order in Case C-192/03 P *Alcon v OHIM* [2004] ECR I-8993, paragraph 41).

72 As a result, the Court of First Instance was fully justified in holding, in paragraphs 82 to 84 of the judgment under appeal, that the fact that the data in question relate to a period subsequent to the date of filing the application for registration of the Aire Limpio mark is not sufficient to deprive those data of their evidential force as regards the finding that mark No 91 991 is well known, since they enable conclusions to be drawn on the situation as it was on the date when that application for registration was filed.

73 In that regard, the Court of First Instance specifically explained, in a clear and coherent manner, that, in particular, a market share of 50% in 1997 and 1998 can have been acquired only progressively, which suggests that the situation was not appreciably different in 1996.

74 Secondly, it is necessary to dismiss L & D's contentions against paragraph 85 of the judgment under appeal, in which the Court rejected the appellant's argument seeking to show that the Board of Appeal was wrong to find that the earlier mark had a particularly distinctive character in Italy by relying solely on general indications regarding the sales figures and volume of advertising.

75 In fact, as the Court of First Instance correctly found, the Board of Appeal, in order to establish whether the ARBRE MAGIQUE mark was well known, took into account not only indications concerning the sales figures and volume of advertising, but also the prolonged use of that trade mark.

76 Since that finding in itself justifies the conclusion reached by the Court of First Instance in paragraph 85 of the judgment under appeal, the Court finds that the second ground given in that paragraph, according to which the case-law relied on by L & D concerns the acquisition of the distinctive character of a mark which is the subject of an application for registration and not the assessment of whether a registered mark is well known, was included merely for the sake of completeness.

77 Accordingly, any defects in that ground are not sufficient to cast doubt on the conclusion of the Court of First Instance, so that L & D's argument seeking to establish such defects is ineffective.

78 Thirdly, concerning the argument put forward by L & D that the Court of First Instance, in paragraph 86 of the judgment under appeal, wrongly took as a basis the prolonged use of the ARBRE MAGIQUE mark by placing the date of registration of that mark on the same footing as its actual use, that assertion is not correct in fact. Contrary to what the appellant submits, the Court, in order to establish the prolonged use of the ARBRE MAGIQUE mark, referred not to its date of registration, but to the fact that that use is established in Italy and, indeed, not disputed by L & D. In addition, since it was not claimed that those findings of the Court of First Instance distorted the facts in any way, the Court's assessment of the facts cannot be checked by the Court of Justice on appeal.

79 Finally, in so far as L & D further disputes the evidential value of the data relating to sales and advertising on the grounds that they relate to the 'ARBRE MAGIQUE' name and the present case concerns low-cost goods in everyday use, it need only be pointed out that the assessment by the Court of First Instance of the evidence produced before it does not constitute, unless that evidence has been distorted, an

issue of law subject to review by the Court (see judgment of 17 April 2008 in Case C-108/07 P *Ferrero Deutschland* v *OHIM*, paragraph 30).

80 Since the arguments raised by L & D in support of this complaint are ineffective, inadmissible or unfounded, it must be rejected.

81 Accordingly, the first branch of the first plea must be rejected.

(b) The second branch of the first plea

82 By this second branch, L & D challenges the analysis made by the Court of First Instance in paragraphs 91 to 96 of the judgment under appeal of the similarities between mark No 91 991 and the Aire Limpio mark. The appellant submits, inter alia, that the Court was wrong in holding that the graphic element of the Aire Limpio mark has a clearly dominant character in the overall impression, which noticeably prevails over the word element.

83 However, the fact remains that the Court of First Instance made in that context an assessment of the facts which, unless the appellant claims those facts were distorted, cannot be reviewed by the Court of Justice on appeal.

84 Furthermore, it must be added that, contrary to what L & D maintains, there is no rule to the effect that the name used in a trade mark must be regarded as distinctive and fanciful where it is devoid of any specific meaning. Moreover, as observed in paragraph 55 above, nor does the Court's case-law show that the word element of

a complex mark is systematically dominant in the overall impression given by that mark.

85 It follows from the foregoing that the second branch of the first plea is inadmissible.

(c) The third branch of the first plea

86 By this third branch, L & D maintains that the Court of First Instance erred in law in concluding that there was a likelihood of confusion without taking into consideration the weak distinctive character of mark No 91 991 and the differences between the marks in question.

87 However, as has already been held, the Court of First Instance did not err in law in finding that mark No 91 991 possesses a particularly distinctive character and that that mark and the Aire Limpio mark have visual and conceptual similarities.

88 Accordingly, the third branch of the first plea must be rejected.

89 Since none of the three branches of the first plea, alleging infringement of Article 8(1)(b) of Regulation No 40/94, has been accepted, that plea must be rejected.

2. The second plea, alleging infringement of Article 73 of Regulation No 40/94

90 By its second plea, L & D submits that the Court of First Instance infringed Article 73 of Regulation No 40/94 by taking as its basis evidence which concerned not mark No 91 991 but the ARBRE MAGIQUE mark. The appellant claims that it was not able sufficiently to defend itself against that evidence since the Opposition Division and the Board of Appeal discounted the ARBRE MAGIQUE mark from the comparative examination to determine whether there was a likelihood of confusion.

91 It should first of all be recalled that Article 73 provides that decisions of OHIM are to state the reasons on which they are based and are to be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.

92 In the present case, it is common ground that the Court of First Instance referred to the same evidence as that already relied on by the Board of Appeal to establish that mark No 91 991 is well known.

93 Although the contested decision does not specifically mention the mark to which that evidence relates, the fact none the less remains that L & D itself complains in its application before the Court of First Instance that the figures relating to sales and advertising costs used by the Board of Appeal do not concern mark No 91 991, but concern primarily goods bearing the 'ARBRE MAGIQUE' name.

94 In addition, Sämänn's opposition was also based on the ARBRE MAGIQUE mark and that party had already submitted the evidence in question at the stage of the proceedings before the Opposition Division.

95 Accordingly, L & D cannot profitably claim not to have had an opportunity to present its comments on the evidence taken into consideration by the Court of First Instance and the Board of Appeal.

96 Therefore, it is necessary to reject the second plea and, consequently, to dismiss L & D's appeal.

VI — Costs

97 According to the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs.

98 Under Article 69(2) of those Rules, applicable to the procedure on appeal pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As OHIM has applied for costs against L & D and the latter has been unsuccessful, L & D must be ordered to pay the costs of these proceedings.

On those grounds, the Court (Second Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders L & D SA to pay the costs.**

[Signatures]